

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCESCO GALLO,

Plaintiff,

-against-

ALITALIA – LINEE AEREE ITALIANE –
SOCIETA PER AZIONI, PIERANDREA GALLI,
and GIULIO LIBUTTI,

Defendants.

Case No. 07 CV 06418 (CM)(RLE)

**SUPPLEMENTARY REPLY ADDRESSING THE AFFIDAVIT AND DEPOSITION OF
NUNZIA FATICA GALLO**

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S.p.A., Pierandrea Galli, and Giulio Libutti*

Pursuant to the Court's Order of August 1, 2008, Defendants Alitalia Linee Aeree Italiane, SpA ("Alitalia"), Pierandrea Galli ("Galli") and Giulio Libutti ("Libutti")(collectively "Defendants") hereby submit their Supplementary Reply on their motion for summary judgment with respect to the Affidavit of Nunzia Fatica Gallo ("NFG Aff."), Plaintiff's wife, and her subsequent deposition ("NFG Dep."), which took place on August 15, 2008.¹

ARGUMENT

I. MS. GALLO'S TESTIMONY ESTABLISHES THAT PLAINTIFF'S DEFAMATION CLAIM IS TIME-BARRED

Plaintiff's defamation claim is based on an alleged telephone call from defendant Libutti to Ms. Gallo. In their moving papers, Defendants suggested that the claim is untimely, as there was some testimony that cast doubt on whether the call was made within a year of the filing of the initial Complaint, as required by CPLR § 215[3]. Ms. Gallo's deposition confirms this.

Plaintiff filed his Complaint on June 20, 2007. It is undisputed that Plaintiff entered the Payne-Whitney Clinic on June 20, 2006 (Facts ¶ 60). Although Ms. Gallo's Affidavit states that she received the alleged defamatory phone call on June 20, 2006 (NFG Aff. ¶ 3), her repeated deposition testimony affirms that the call occurred a day or two *before* Plaintiff entered the Payne Whitney clinic on June 20, 2006.

Ms. Gallo testified that she did not consult any calendar when she wrote the date into her affidavit, but she was sure that Libutti's "telephone call took place the day before or two days before" Plaintiff entered Payne-Whitney (NFG Dep. 40:8-19; 42:4-7; 61:5-7). Ms. Gallo relied strictly on her mistaken memory that Plaintiff entered Payne Whitney on June 21st or 22nd, 2006 (NFG Dep. 39:8-21; 41:25-42:7). When asked how she remembered the exact date of the call, Ms. Gallo conceded that she "could be wrong by a day or two" (NFG Dep. 38:18-22). When

¹ The NFG Aff. is attached to the Affirmation of Alan M. Koral ("Koral Aff.") as Exhibit A. Citations to the NFG Dep. are attached to the Koral Aff. as Exhibit B.

recounting details of the call, Ms. Gallo repeated that Plaintiff was not yet at the Payne-Whitney clinic when the call took place (NFG Dep. 51:15-21). Based on Ms. Gallo's repeated and unequivocal testimony, Plaintiff's claim for defamation is time barred.

II. MS. GALLO'S AFFIDAVIT MAY BE DISREGARDED BECAUSE NEW EVIDENCE SHOWS THAT PLAINTIFF WAS DILATORY IN SUBMITTING IT

The Court, in its August 1, 2008 Order, denied Defendants' request to exclude Ms. Gallo's affidavit, but may wish to revisit that ruling based on Ms. Gallo's recent testimony. She received a draft of her affidavit from Plaintiff in early June (NFG Dep. 25:12-24) but was never told about any deadline (NFG Dep. 28:5-8). She did not edit, retype and sign the affidavit until July 2, 2008 (NFG Dep. 25:5-27:20), five days after Plaintiff served his opposition to the instant motion. Ms. Gallo left the affidavit for Plaintiff that evening and told him she had signed it (NFG Dep. 34:13-25), but Plaintiff failed to submit Ms. Gallo's affidavit until July 24, 2008—over three weeks later—when Plaintiff's counsel informed the Court that he had “just received” it. No explanation for these long delays has been offered by Plaintiff.²

Dated: New York, New York
September 4, 2008

VEDDER PRICE P.C.

By: /s/ Alan M. Koral

Alan M. Koral (AK 1503)

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² If space allowed, Defendants would show that neither Ms. Gallo's affidavit nor her testimony confirms the allegation in the Amended Complaint (¶ 67) as to what Libutti said to Ms. Gallo, and arguably is not defamatory at all.